(9)

No. 98-1836

Supreme Court, U.S.
FILED
JUN 14 2000
CLERK

In the Supreme Court of the United States

UNITED STATES HEALTHCARE SYSTEMS OF PENNSYLVANIA, INC.,

Petitioner,

v.

PENNSYLVANIA HOSPITAL INSURANCE CO. AND THE COMMONWEALTH OF PENNSYLVANIA MEDICAL PROFESSIONAL LIABILITY CATASTROPHE LOSS FUND,

Respondents.

On Petition For A Writ Of Certiorari To The Pennsylvania Supreme Court

SUPPLEMENTAL BRIEF FOR PETITIONER IN RESPONSE TO *PEGRAM* v. *HERDRICH*, NO. 98-1949 (JUNE 12, 2000)

BURT M. RUBLIN
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street
Philadelphia, PA 19103
(215) 665-8500

ROY T. ENGLERT, JR.
Counsel of Record
SHARON SWINGLE
MAYER, BROWN & PLATT
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Petitioner

7 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

CONCLUSION 4

TABLE OF AUTHORITIES

Page(s)

Cases

Pegram v. *Herdrich*, No. 98-1949 (June 12, 2000) . . *passim*

SUPPLEMENTAL BRIEF FOR PETITIONER IN RESPONSE TO *PEGRAM* v. *HERDRICH*, NO. 98-1949 (JUNE 12, 2000)

Pursuant to Rule 15.8 of the Rules of this Court, Petitioner submits this brief in response to *Pegram* v. *Herdrich*, No. 98-1949 (June 12, 2000). As the government recognized in its Court-requested Brief for the United States as Amicus Curiae, "if the decision in *Pegram* does not fully dispose of the question presented in this case, the Court should grant plenary review in this case to ensure uniform interpretation of the extent to which ERISA beneficiaries may bring state-law negligence claims against HMOs." U.S. Br. 20; accord *id.* at 6-7 ("[B]oth the conflict between the Pennsylvania Supreme Court and several courts of appeals, and the importance of the question presented here, suggest that, if *Pegram* does not clearly resolve this case, plenary review would be warranted.").[1] *Pegram* does not "fully dispose" of the question presented here, or "clearly resolve this case." Accordingly, plenary review is appropriate and certiorari should now be granted.

This case presents the question whether a state-law tort challenge to an HMO's benefits determination is preempted by ERISA. *Pegram*, by contrast, addresses whether a physician-owned HMO's decision about whether to order a particular treatment for a particular patient was subject to a claim for breach of an ERISA fiduciary duty.[2] The Court characterized the HMO's decision as a "mixed eligibility and treatment decision[ ]" (slip op. 17) and held that it was *not* subject to an ERISA claim for breach of fiduciary duty, because the physician-owners were not acting as ERISA fiduciaries.

---

[1] Our Supplemental Brief for Petitioner in Response to Brief for the United States as Amicus Curiae cited to the initial, typescript version of the government's brief. In this brief we cite to the final, printed version.

[2] Petitioner in this case is not a physician-owned HMO.

The government proffered two theories about how *Pegram* might affect this case. First, the government suggested that this Court might agree with the *Pegram* petitioners' argument that the "intended benefit" in an ERISA plan that provides medical benefits through an HMO is merely membership in the HMO. U.S. Br. 19. That rationale, the government argued, might provide an alternate basis for affirming the Pennsylvania Supreme Court's decision in this case. *Ibid.* Because "the conduct of the HMO in this case would not involve a claim for benefits under an ERISA plan (because it would not involve a question of membership in the HMO)," the government elaborated, "it is likely that the state-law negligence claim would therefore not be preempted." *Ibid.*

This Court did not, however, adopt the *Pegram* petitioners' argument that the "intended benefit" of the plan was merely membership in the HMO. As this Court recognized in *Pegram*, the HMO could be subject to a fiduciary duty under ERISA only if that duty arose in the course of the HMO's administration of the plan. Slip op. 10. If the Court had accepted the *Pegram* petitioners' argument, it would not have had to analyze whether the HMO's treatment decision concerning an HMO member could have constituted a breach of fiduciary duty. Because the Court did not accept the argument that the government says might have justified a non-preemption ruling in this case, *Pegram* does not in this respect justify either a grant/vacate/remand order or a denial of certiorari.

The government also suggested that the decision in *Pegram* might affect this case because the Court could "adopt[ ] the view" that "the 'administration' claims in *Pegram* are controlled by the principal that determinations regarding the benefits due under ERISA plans are governed by ERISA and its fiduciary duty standards," and "reaffirm[ ] the underlying principle" that "state-law claims based on the performance of such duties are preempted precisely because they *are* governed by ERISA." U.S. Br. 19 (emphasis in original). But the *Pegram* Court treated the relevant HMO actions in that case as "mixed

eligibility and treatment decisions" and rejected the argument that such claims are fiduciary in character. Slip op. 17-18, 20, 25. The Court did not analyze the preemption consequences that would flow from a determination that an HMO's actions *do* constitute benefits determinations subject to ERISA.[3] In the present case, however,

> the Pennsylvania Supreme Court did not suggest that petitioner acted other than in its role as plan administrator, or, indeed, that petitioner exercised any medical judgment at all. Rather, the undisputed facts indicate that petitioner, responding to an inquiry from a physician on behalf of a patient, *made a benefit determination.*

U.S. Br. 12 (emphasis added). Thus, this case is different from *Pegram* because it undisputedly involved a pure benefits determination, and because the issue it raises — preemption — was not reached, even in dicta, in *Pegram.*

Because of these differences, an order granting certiorari, vacating, and remanding for further consideration in light of *Pegram* would almost certainly leave the Supreme Court of Pennsylvania scratching its (metaphorical) head about what relevant insights it is supposed to have gleaned from *Pegram*, and in all likelihood would result in a mere reaffirmance of the erroneous (U.S. Br. 7-14) and certworthy (*id.* at 14-18) decision that the state court has already reached. And nothing in *Pegram* could even conceivably justify a denial of certiorari — indeed, all of respondents' arguments for denying certiorari, which have nothing to do with *Pegram*, were considered and rejected when this Court opted to ask for the Solicitor General's views and then hold the case. The only reasonable course remaining is the

---

[3] The Court's only mention of preemption was at the end of the opinion, where the Court observed that applying a *malpractice* standard under ERISA — a course that the Court rejected — "would seem to be a prescription for preemption of state malpractice law." Slip op. 24.

one suggested by the Solicitor General last December: now that *Pegram* has been decided and does not "fully dispose of the question presented in this case" (*id.* at 20), the Court should grant certiorari for full briefing and argument on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

BURT M. RUBLIN
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street
Philadelphia, PA 19103
(215) 665-8500

ROY T. ENGLERT, JR.
Counsel of Record
SHARON SWINGLE
MAYER, BROWN & PLATT
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

JUNE 2000